Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 88–24)

COMMERCIAL GAUGER APPROVAL

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval of a commercial gauger.

SUMMARY: Pursuant to § 151.13, Customs Regulations (19 CFR 151.13), Compu-Survey, 4909 College Park Drive, (P.O. Box 69), Deer Park, Texas 77536, applied to Customs for approval to gauge imported petroleum and petroleum products and bulk liquid organic chemicals. Customs has determined that Compu-Survey meets all of the requirements for approval.

Accordingly, Compu-Survey is hereby conditionally approved to gauge imported petroleum and petroleum products and bulk liquid organic chemicals in all Customs districts.

EFFECTIVE DATE: April 25, 1988.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Office of Technical Services, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–2446).

Dated: April 29, 1988.

JOHN B. O'LOUGHLIN,
Director,
Office of Technical Services.

[Published in the Federal Register, May 5, 1988 (53 FR 16209)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 87–1404)

BURROUGHS CORP., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

John S. Rode, Rode and Qualey, of New York, New York, argued for plaintiff-appellant. With him on the brief was *William J. Maloney.*

Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Richard K. Willard,* Assistant Attorney General, *David M. Cohen,* Director and *Susan Handler-Menahem.*

Appealed from: U.S. Court of International Trade.
Judge DICARLO.

(Decided April 26, 1988)

Before MARKEY, *Chief Judge,* SMITH and ARCHER, *Circuit Judges.*

SMITH, *Circuit Judge.*

Burroughs Corporation (Burroughs) appeals from the judgment of the United States Court of International Trade that its merchandise was properly classified under item 676.15 of the Tariff Schedules of the United States (TSUS) as accounting, computing, and other data processing machines incorporating a calculating mechanism.[1] We affirm.

ISSUE

Whether the Court of International Trade erred in holding that the merchandise was properly classified under 676.15 of TSUS.

I. *Background*

Burroughs imported certain office machines invoiced as electronic desk calculators, transaction recorders, and transaction terminals into the United States. All of the machines perform the four basic arithmetic functions: addition, subtraction, multiplication, and division. In addition, the C Series Calculators are preprogrammed to perform complex business computations for installment, commer-

[1] *Burroughs Corp.* v. *United States,* 664 F. Supp. 507 (Ct. Int'l Trade 1987).

cial, and mortgage loans, future-value calculations for individual retirement accounts, and other banking and nonbanking calculations. The TR/TT Series Machines are used to record a broad range of money transactions and to establish effective cash control. They can record the amount of money received in a particular transaction, as well as keep track of the total amount of money received daily, certify sales slips, total receipts, and provide coded data which can later be recorded in other documents or ledgers. They are also capable of verifying account numbers, processing and recording the transfer of funds among accounts, reading magnetically coded data on credit cards, and providing general auditing.

The United States Customs Service (Customs) classified the machines under item 676.15 of TSUS and assessed duty at the rate of 5.5 percent ad valorem. The superior heading and item 676.15 provide:

> Calculating machines; accounting machines, cash registers, postage-franking machines, ticket-issuing machines, and similar machines, all the foregoing incorporating a calculating mechanism;
>
> > Accounting, computing, and other data-processing machines.

Headnote 2(b) defines the term "calculating mechanism" as:

> [A] "*calculating mechanism*" is one designed to perform one or more of the four arithmetical operations, i.e., addition, subtraction, multiplication, and division.

Burroughs challenged Customs' classification of the machines in the Court of International Trade. Burroughs contended that the machines should have been classified under item 676.30 as office machines not specially provided for, with a duty of 5.0 percent ad valorem. According to Burroughs, the machines do not contain a calculating mechanism within the meaning of Headnote 2(b) and, thus, do not fall within item 676.15.

The Court of International Trade recognized that the term "calculating mechanism" had never been judicially interpreted. However, the court viewed the Court of Customs and Patent Appeals' (CCPA) interpretation of the term "mechanism" in *United States* v. *Texas Instruments Inc.*[2] as controlling. In Texas Instruments, the CCPA had concluded that the term "mechanism" could not cover an integrated circuit which was to be used in a watch because it did not contain moving parts.

The Court of International Trade rejected, as too narrow an interpretation of the definition of "mechanism," Burroughs' argument that, because the calculations in the machines took place completely within the arithmetic logic unit which had no moving parts, the machines did not contain a calculating mechanism. Instead, the

[2] *United States* v. *Texas Instruments Inc.*, 620 F.2d 269 (CCPA 1980).

court considered whether "the subject merchandise incorporate[d] a structure of working parts which function together to produce an effect, *i.e.* the calculations." The court then found, based on the testimony at trial and an examination of the machines, that the keyboard and the printer contained moving parts and, consequently, that the machines contained a calculating mechanism. The court held that the machines were properly classifiable under item 676.15 of TSUS.

II. *The Definition of "Calculating Mechanism"*

Burroughs argues that the definition of "mechanism" in *Texas Instruments* is "authoritative and controlling precedent," as held by the Court of International Trade. The Government contends that the *Texas Instruments* case is not controlling because it was decided in the context of the horological industry. According to the Government, the development of the watch industry at the time TSUS was enacted was substantially different from that of the computer industry. This difference, which is reflected in the legislative history of the provisions in question, suggests that a different meaning was intended by Congress for the term "calculating mechanism."

The Court of International Trade "decline[d] to engage in speculation regarding alleged congressional intent" because it viewed the definition of "mechanism" in *Texas Instruments* as involving TSUS as a whole. We disagree. The *Texas Instruments* case dealt with the horological industry. The term "mechanism" was defined by the CCPA in the course of determining whether the integrated circuit at issue was part of a watch or clock movement. At the time TSUS was enacted, all watches had moving parts. The court in *Texas Instruments* specifically noted that it was not until 1972 that any watches were produced which did not contain moving parts. In contrast, computers using electronic parts were well known in 1962. The CCPA's definition of "mechanism" must be read in this light and, therefore, it does not control the definition of "calculating mechanism" at issue in this case.

The definition of "mechanism" was not limited to articles which contained moving parts at the time TSUS was enacted. "Mechanism" is defined in The American College Dictionary (1962) by Random House as:

> 2. the machinery, or the agencies or means, by which a particular effect is produced or a purpose is accomplished * * *. 4. the structure, or arrangement of parts, of a machine or similar device, or anything analogous.

Webster's New Collegiate Dictionary (1959) defines "mechanism" as:

> 1. The parts of a machine, taken collectively; the arrangement or relation of the parts of anything as adapted to produce an effect.

As these definitions make clear, the meaning of the term "mechanism" was not limited to something with moving parts. Therefore, we must consider the legislative history to determine what Congress intended when it defined the term "calculating mechanism" in Headnote 2(b).

In the *Tariff Classification Study*,[3] the proposed statute created a classification for office machines in Schedule 6, Part 4, Subpart G. These machines had been classified under paragraphs 353 and 372 of the Tariff Act of 1930. Paragraph 353 contained provisions for "articles having as an essential feature an electrical device or element." Included among the articles classified under paragraph 353 were "calculating machines specially constructed for multiplying and dividing, and having an electric motor as an essential feature," and "adding machines having an electric motor as an essential feature". Paragraph 372 included provisions for accounting machines, adding machines and calculating machines specially constructed for multiplying and dividing which did not have an electrical device as an essential feature.

The new classification was designed to combine paragraphs 353 and 372 and to provide a more systematic way to classify office machines.[4] Under the general category of office machines, the proposed statute provided for:

> Calculating machines; accounting machines, cash registers, postage-franking machines, ticket-issuing machines, and similar machines, all the foregoing incorporating a calculating mechanism.

The phrase "calculating mechanism" was defined in Headnote 2(b) in terms of the results to be achieved, "designed to perform one or more of the four arithmetical operations," rather than in terms of the method of accomplishing those results. Computers having electronic components were well known to the drafters of TSUS, and nothing in the legislative history indicates that Congress intended to exclude them from the term "calculating mechanism." In fact, a letter from the Electronics Industry Association (EIA) to the Tariff Commission supports the view that computers with electronic components were intended to fall within this provision. With regard to item 676.15, the letter stated:[5]

> 676.15: *Accounting, computing, and other data-processing machines*
>
> It is proposed by EIA that accounting machines be removed from this category and that it cover only computing and data-processing machines.
>
> From the standpoint of the electronics industry, an accounting machine bears little relationship to a computer and data-

[3] U.S. Tariff Comm'n, *Tariff Classification Study*, Schedule 6.—Metals and Metal Products (1960).
[4] *Id.* at 273–74.
[5] Letter from James Secrest, Executive Vice President, Electronics Indus. Ass'n, to Donn Bent, Secretary, U.S. Tariff Comm'n (July 23, 1959), *reprinted in Tariff Classification Study*, at 872–75.

processing machine. The latter are highly complex, are based upon electronic theory, and have a high unit value and relatively small market. U.S. production facilities for computers and data-processing machines are in the infant stage while the market for accounting machines is on the decline relatively. Production techniques are largely unrelated.

CONCLUSION

We conclude that the term "calculating mechanism" does not require moving parts and was intended to cover machines in which the calculations are performed in integrated circuits. Therefore, the judgment of the United States Court of International Trade that the subject merchandise contains a calculating mechanism within the meaning of Schedule 6, Part 4, Subpart G, Headnote 2(b), of TSUS is affirmed.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 88–46)

STANDARD COMMODITIES IMPORT & EXPORT CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 77–12–04812

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

The Customs Service classified certain imported steel articles as "tubes" under item 610.32, TSUS. Plaintiff contends that the merchandise is properly classifiable as parts of not self-propelled vehicles, not specially provided for, under item A692.60, TSUS.

Held: Plaintiff has not proven that the merchandise was improperly classified, and has failed to rebut the presumption of correctness that attaches to the government's determination. The steel articles were properly classified as "tubes" under item 610.32, TSUS.

(Dated April 21, 1988)

Stein Shostak Shostak & O'Hara (Robert Glenn White), for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch *(Michael P. Maxwell),* for defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain steel products imported from Brazil in 1976, and described on the customs invoices as "tubes."

The imported merchandise was classified by the Customs Service under item 610.32, Tariff Schedules of the United States (TSUS), as steel "tubes" * * * [w]elded, jointed, or seamed, with walls not thinner than 0.065 inch, and of circular cross section * * * 0.375 inch or more in outside diameter." Consequently, the merchandise was assessed with duty at a rate of 0.3 cents per pound.

Plaintiff protests this classification, and contends that the imported merchandise should properly be classified as "[v]ehicles (including trailers), not self-propelled, not specially provided for, and parts thereof" under item A692.60, TSUS. If properly classifiable under item A692.60, TSUS, as maintained by plaintiff, the merchandise

would be entitled to duty-free treatment under the Generalized System of Preferences.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified under:

Schedule 6, Part 2, Subpart B:

Pipes and tubes and blanks therefor, all the foregoing of iron (except cast iron) or steel:

	Welded, jointed, or seamed, with walls not thinner than 0.065 inch, and of circular cross section:	
	Other than alloy iron and steel:	
* * * * * * *		
610.32	0.375 inch or more in outside diameter	0.3¢ per lb.

Claimed under:

Schedule 6, Part 6, Subpart B:

A692.60	Vehicles (including trailers), not self-propelled, not specially provided for, and parts thereof	[duty-free]

The question presented is whether the imported merchandise has been properly classified by Customs as steel tubes under item 610.32, TSUS, with duty at a rate of 0.3 cents per pound, or whether it is properly classifiable as parts of vehicles, not self-propelled, not specially provided for, under item A692.60, TSUS, and therefore entitled to duty-free treatment, as contended by plaintiff.

In order to decide the question presented, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984). Pursuant to 28 U.S.C. § 2639(a)(1), the government's classification is presumed to be correct and the burden of proof is upon the party challenging the decision. *See Jarvis Clark Co.*, 733 F.2d at 876.

After an examination of the merchandise, the exhibits, the testimony of record, the tariff schedules, and the relevant case law, it is the determination of the court that plaintiff has not overcome the presumption of correctness, and that the imported merchandise was properly classified as "tubes" under item 610.32, TSUS.

It is undisputed that the imported merchandise is made of steel, and is tubular in shape. The articles were ordered and manufactured pursuant to the specifications of plaintiff's customers, to be used ultimately as axles for various types of trailers, for agricultural uses, and for use in mobile homes. The articles were ordered in

four lengths, ranging from 7 feet 1¾ inches to 9 feet 3¾ inches. The ends of the articles were square-cut, beveled, and reamed. They were purchased according to an American Society of Testing Materials (ASTM) standard for mechanical tubing, refereed to as ASTM A513, and therefore, fall within the dimensional requirements of item 610.32, TSUS.

The headnote applicable to item 610.32, TSUS, headnote 1(iv) of Schedule 6, Part 2, however, provides that Part 2 does not include "other articles specially provided for elsewhere in the tariff schedules, or parts of articles." Hence, the court must determine whether the merchandise is specially provided for under item A692.60, TSUS, as parts of not self-propelled vehicles.

Plaintiff contends that the imported articles are properly classifiable as parts of not self-propelled vehicles, under item A692.60, TSUS. It asserts that since the tubular articles are cut to specified lengths and the ends of the tubes are finished, it is commercially impractical to use them for purposes other than as parts of not self-propelled vehicles.

Defendant contends that the merchandise was not chiefly used as parts of not self-propelled vehicles, and was suitable for a variety of uses. In addition, the defendant contends that if the court concludes that the imported merchandise has been advanced to the condition of parts, it would not be classifiable under the provision for not self-propelled vehicles, as urged by plaintiff, because the merchandise is used primarily in mobile homes which should not be classified as not self-propelled vehicles under the tariff schedules.

The action was previously before the court on a motion by plaintiff for summary judgment. *See Standard Commodities Import & Export Corp.* v. *United States,* 9 CIT 609 (1985). Since there was a fundamental disagreement between the parties as to "whether the imported tubes are standard tubes suitable for many purposes, or whether they are specially manufactured tubes, whose only practical use is as axles on not self-propelled vehicles," the court denied the motion for summary judgment. *Standard Commodities,* 9 CIT at 612–13.

General Interpretive Rule 10(ij) states that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part." As noted by the court in *Standard Commodities,* "[t]he chief use of a product is defined as the use that exceeds all other uses combined. *See* General Interpretive Rule 10(e)(i). The actual use of any particular shipment of imported merchandise is not dispositive of its proper classification." *Standard Commodities,* 9 CIT at 612; *see Amorient Petroleum Co.* v. *United States,* 9 CIT 197, 201, 607 F. Supp. 1484, 1487 (1985). The court explained that "it is the chief use of the class or kind of merchandise in question that determines its proper classification under a chief use provision of the tariff sched-

ules." *Standard Commodities,* 9 CIT at 612; *see Pistorino & Co.* v. *United States,* 67 CCPA 1, 4, C.A.D. 1234, 607 F.2d 989, 992 (1979).

Several relevant factors have been noted in determining the class or kind of merchandise in question. The pertinent factors are:

> the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, * * * the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed), * * * the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, [and] the recognition in the trade of this use.

United States v. *Carborundum Co.,* 63 CCPA 98, 102, C.A.D. 1172, 536 F.2d 373, 377 (citations omitted), *cert. denied,* 429 U.S. 979 (1976).

The first *Carborundum* factor is "the general physical characteristics" of the imported merchandise which were not shown to be significantly different from those of general purpose mechanical tubing designated as ASTM A513. According to the plaintiff, since the articles are cut to a specific length and have a specific end finish, they are articles for not self-propelled vehicles rather than tubing. In support of its position plaintiff offered the testimony of two witnesses who were its employees at the time the merchandise was imported.

Mr. David H. Taylor, president and founder of Standard Commodities Import & Export Corporation (Standard Commodities), testified that the imported merchandise was individually ordered for each customer based on the customer's specific requirements. Mr. Taylor explained that the items were designed to be attached to a chassis as axles to be used in not self-propelled trailers and in mobile homes. The nature of the width, length, wall thickness, and outside dimension, according to Mr. Taylor, was determined primarily by the user.

Plaintiff's second witness, Mr. William Spoliansky, was the director of marketing and sales for Standard Commodities, and has an engineering degree from the University of Argentina. Mr. Spoliansky testified that the merchandise was specially made in accordance with the clients' drawings and specifications. He testified that the merchandise was manufactured into axles which could then be used in "a mobile home, or a travel trailer, or horse trailer, or utility trailer, boat trailer, and there's a lot of different designations." According to Mr. Spoliansky the principal reasons for concluding that the merchandise was not "tubes" was because of the length to which it was cut, the manner in which the ends were finished, and its uses. Mr. Spoliansky emphasized that the cutting of the items to a specific length was the important process that changed the tubing to something else.

In support of the classification by Customs and in opposition to plaintiff's argument, defendant offered the testimony of Mr. Louis Lazzari, a manager of technical services of Quanex II Group, a part of Quanex Corporation (Quanex). Quanex produces various types of tube products. Mr. Lazzari, who has a degree in metallurgical engineering and worked as a metallurgist for 22 years, testified as an expert witness on tube manufacturing, production, and sales.

Mr. Lazzari testified that from an examination of the commercial invoices and specification sheets for the imported merchandise, it would be described as "mechanical tubing." He also testified that the imported merchandise fell within the dimensions of ASTM A513 tubing, which was a generalized specification for tubing production. He stated that there is no single end use to which the merchandise would be dedicated.

Mr. Lazzari testified that the specific length and end-finishing of the merchandise did not limit the use of the merchandise as axles, but rather, that "mechanical tubing is, for the most part, tailor-made, to fit a certain set of requirements." Mr. Lazzari explained that mechanical tubing by definition is custom-made. He stated that, although there would not be as wide a variety of end uses for the imported tubing as for tubing with just a square-cut end, the end-finishing is fairly common, and would not render the material unsuitable for a variety of uses.

According to Mr. Lazzari, the merchandise could be used as conveyor rolls, as drive tubing, for torque-type tubing, in structural members, and for agricultural equipment. He added that it could also be used to convey oils or lubricants, as a wiring conduit, and could be cut into smaller lengths for various other uses.

To classify the merchandise as axles or parts of not self-propelled vehicles, it must be shown that the steel tubing is so processed as to exclude a large portion of its potential uses. *See, e.g., B.A. McKenzie & Co.* v. *United States*, 47 CCPA 42, 45, C.A.D. 726 (1959). Although, plaintiff argues that the physical characteristics of the imported merchandise are unique to axles, the evidence does not establish that the merchandise is distinct from ASTM A513 mechanical tubing and that it may not be used for a large portion of the potential uses of tubing.

From the testimony at trial, it is clear that the "expectation of the ultimate purchasers" of the merchandise was to purchase "tubing," to be used in the manufacture of axles. Plaintiff's witness, Mr. Taylor, testified that the articles were purchased by its customers to be processed into axles which were attached to the chassis of a trailer. The trailers could be used for hauling boats, animals, or for agricultural purposes. He testified that the merchandise was also used on mobile homes. Mr. Taylor testified, however, that his company had not attempted to sell the ASTM A513 tubing for purposes other than as axles.

The "channels, class or kind of trade in which the merchandise moves," and the "environment" of the sales indicate that the merchandise fits the general category of mechanical tubing. It is pertinent that the merchandise, although tailored to certain specifications, was manufactured by Persico Pizzoniglio S.A. (Persico), and Fornasa, S.A. (Fornasa), which are tubing mills whose only business is the production and sale of tubes.

In advertising its tubing to potential customers, Persico describes the applications of its ASTM A513 equivalent tubing as "general industrial purposes where precision is required such as: automotive industry, motorcycles, bicycles, electric home appliances, shock absorbers * * *." Plaintiff's witness, Mr. Taylor, testified that the specification ASTM A513 is a standard generic term for mechanical tubing which covers a type of tubing falling within a range of structural strengths which could be utilized in various end uses. He stated that Standard Commodities used this specification to ease the ordering process with suppliers.

Mr. Taylor agreed with the defendant's contention that the Steel Customer Communications System for Steel Mechanical Tubing specifically states that steel tubing should be ordered with specific degrees of beveling and in specific lengths. He also acknowledged that the commercial invoices and purchase orders of Standard Commodities described the imported merchandise as "tubes."

The defendant submits that admissions by plaintiff's witness that the relevant documents, purchase orders, and commercial invoices of Standard Commodities referred to the imported merchandise as tubes or tubing, and not as axles, cannot be disclaimed absent clear and convincing proof. *See, e.g., Globemaster Midwest, Inc.* v. *United States,* 67 Cust. Ct. 539, 545, 337 F. Supp. 465, 469 (1971). While statements in invoices may be admissions against interest, they do not preclude the parties from showing the true character of the merchandise. *Amersham Corp.* v. *United States,* 5 CIT 49, 61, 564 F. Supp. 813, 820 (1983), *aff'd,* 728 F.2d 1453 (1984). The evidence, however, shows clearly that the merchandise was sold through the channels of trade for mechanical tubing, and was purchased in a manner common to that of the steel mechanical tubing industry.

The final *Carborundum* factor, applicable to this case, is that of the economic practicality of using the merchandise for purposes other than as axles. Plaintiff maintains that any other use of the imported merchandise would not be commercially practical because of its unique design. Mr. Taylor testified that the imported items, to his knowledge, have no other use in the United States, other than as axles. He further stated that using the items for fence posts, pipes, or in a conveyor business would be commercially impractical because of the cost and the further processing required.

Plaintiff's witness, Mr. Spoliansky, testified that it would be feasible, but commercially impractical to use these items for other uses

such as roll bars on vehicles, or bearings, because a longer length of tube would be required.

Defendant's expert witness, Mr. Lazzari, testified that although he has not seen material with identical outside diameter and wall thickness actually used, he has seen material with similar characteristics used in conveyor rolls, agricultural equipment, rotating shifts, conduit pipes, and other uses. As to the commercial practicality of using the merchandise for an application appropriate for ASTM A513 tubing, Mr. Lazzari testified that "in the general scheme of things I would know that tubing for such an application can demand a very high selling price." Although plaintiff challenged Mr. Lazzari's knowledge of detailed manufacturing costs, plaintiff did not establish that the imported merchandise was incapable of practical uses for applications other than as axles.

As previously noted, it is the chief use of the class or kind of merchandise, not the particular imported merchandise, which must be proven by plaintiff. *See, e.g., Pistorino & Co.* v. *United States,* 67 CCPA 1, 4, C.A.D. 1234, 607 F.2d 989, 992 (1979). Plaintiff's case, however, consisted mainly of evidence of the use of the particular imported merchandise. Hence, plaintiff did not establish that the chief use of the class or kind of merchandise was as parts of not self-propelled vehicles.

Plaintiff further contends that although the merchandise is described generically as tubing, it also can be categorized as parts of not self-propelled vehicles. Pursuant to General Interpretive Rule 10(ij), articles which are described by an *eo nomine* or specific provision such as "tubes" are to be classified thereunder, even though they are also parts of another article. *See, e.g., United States* v. *Oxford Int'l Corp.,* 62 CCPA 102, 104, C.A.D. 1154, 517 F.2d 1374, 1376 (1975). Furthermore, an *eo nomine* designation includes all forms of the article. *See Nootka Packing Co.* v. *United States,* 22 CCPA 464, 470, T.D. 47464 (1935).

Plaintiff, however, submits that, pursuant to headnote 1(iv) of Schedule 6, Part 2, the merchandise is precluded from classification as "tubing," under item 610.32, TSUS, and is classifiable under item A692.60. Headnote 1(iv) of Schedule 6, Part 2, which is applicable to item 610.32, TSUS, provides that Part 2 does not include "other articles specially provided for elsewhere in the tariff schedules, or parts of articles."

In support of this contention the plaintiff cites *E.R. Hawthorne & Co.* v. *United States,* 730 F.2d 1490 (Fed. Cir. 1984). In *E.R. Hawthorne,* the court held that, by virtue of headnote 1(iv), Schedule 6, Part 2, "tapered or conical steel poles 20 to 39 feet long and chiefly used after finishing to support street or highway or other outdoor lights," and which would not be accepted by anyone else, were properly classifiable as parts of illuminating articles even if they were tubes or pipes. *E.R. Hawthorne,* 730 F.2d at 1491. The court noted that generally an *eo nomine* classification takes precedence over a

classification as a part, except pursuant to headnote 1(iv), Schedule 6, Part 2, and held that since the imports in that case were chiefly used as parts of illuminating articles, they had to be classified as parts even if they were tubes. *Id.* at 1492.

The *E.R. Hawthorne* case is distinguishable because the class or kind of merchandise in this case has not been found to be chiefly used as parts of not self-propelled vehicles. Consequently, headnote 1(iv) of Schedule 6, Part 2 does not remove the imported merchandise from the *eo nomine* classification under item 610.32, TSUS, as "tubes." In the case at bar the court concludes that the degree of processing of the imported merchandise has not changed the nature and physical characteristics of the mechanical tubing to render it unsuitable for uses other than as axles for not self-propelled vehicles. *See, e.g., Avins Indus. Prods. Co.* v. *United States,* 62 CCPA 83, 86, C.A.D. 1150, 515 F.2d 782, 784 (1975).

The defendant in this case did not merely rely upon the statutory presumption of correctness. It has submitted competent, credible, and persuasive affirmative evidence to support the presumption that the merchandise has been properly classified as "tubes" under item 610.32, TSUS.

Mr. Lazzari, who testified for the defendant, established, to the satisfaction of the court, that the imported steel articles fall within the general definition of mechanical tubing, and are characterized within the steel tubing industry as mechanical tubing. Mr. Lazzari's testimony also showed that the merchandise fell within the general specification for tubing referred to as ASTM A513, which is used for a wide variety of purposes. Finally, Mr. Lazzari's testimony established that the imported merchandise could be commercially and practically used for a variety of applications.

The defendant also maintains that even if the court should find that the imported merchandise was not "tubes," it still should not be classified as parts of "not self-propelled vehicles," because "a major use of the tubing was for axles on mobile homes, which are not classifiable as not self-propelled vehicles." Since the court has concluded that the imported merchandise was properly classified as "tubes," under item 610.32, TSUS, it is not necessary to consider or determine other arguments or contentions.

In view of the foregoing, it is the determination of the court that the merchandise has been properly classified, and that plaintiff has failed to rebut the presumption of correctness that attaches to the classification of the merchandise by the Customs Service. Accordingly, since the imported merchandise was properly classified as "tubes" under item 610.32, TSUS, plaintiff's action is dismissed.

(Slip Op. 88–47)

E & S FREEDMAN ASSOCIATES, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 79–05–00779, 76–06–01502, 76–12–02767, 77–04–00599, 77–06–01097, 78–01–00126, 78–05–00962, and 78–12–02131

Before WATSON, *Judge.*

[Judgment for defendant.]

(Dated April 25, 1988)

Mandel & Grunfeld, (Steven P. Florsheim), for plaintiff.

John R. Bolton, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, and (*Susan Handler-Menahem*), Civil Division, Department of Justice Commercial Litigation Branch, for defendant.

OPINION AND ORDER

WATSON, *Judge:* In this action plaintiff challenges the appraised value of cigarette lighters imported from Japan in 178 entries during the period from January, 1972 through September, 1978.

The merchandise was appraised on the basis of export value, as defined in Section 402(b) of the Tariff Act of 1930, as the commercial invoices. While the parties initially agreed that export value was the proper statutory basis of appraisement for the merchandise, they disagreed as the plaintiff's claim that the amounts shown on the invoices as buying commissions should be deducted from the appraised value.

The relevant statutory provision reads as follows:

STATUTE

> Section 402b of the Tariff Act of 1930, 46 Stat. 708, as amended by the Customs Simplification Act of 1956, 70 Stat. 943 provides as follows:
>
> (b) *Export Value.*—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

In order to prove its claimed values, plaintiff has to overcome the presumption of correctness which attaches to the appraised values. 28 U.S.C § 2639(a)(1). In order for plaintiff to succeed with respect to its claim for the deduction of buying commissions, it would either have to isolate the element of buying commissions as "improperly"

included in a composite appraised value, or begin anew by proving all the elements of export value from the beginning.

The first method may be used when the appraisement is separable in accordance with the principles stated by this court in *Haddad & Sons, Inc.* v. *United States,* 54 Cust. Ct. 600, 602–603, R.D. 10942 (1965) as follows:

> * * *Where the appraisement is stated in terms of a first cost or ex-factory price, plus the disputed charges, the appraisement is considered to be separable, and the party challenging the appraiser's return may rely upon the presumption of correctness as to all elements of the appraisement which he does not seek to dispute. Thus, such an appraisement may be attached simply by negativing the charges without affirmatively establishing that the ex-factory price is a price which accords with every element entering into the statutory definition of export value. Where, however, the appraised value is expressed as a single indivisible unit, as in the instant case, it is not susceptible of being broken down into its component parts, except by proof sufficient to sustain the burden imposed by statute upon a party who challenges the presumptively correct return of the appraiser of establishing every material element in the basis of value upon which reliance is placed.

The Court is of the opinion that plaintiff failed to satisfy any of its burdens in this action. It did not prove that the appraisement was separable, either on its face or by evidence that the appraising officer *in fact* calculated the appraised value by adding specific charges to the ex-factory prices. Moreover, even if the Court were to address these specific questions of whether the disputed amounts were deductible buying commissions, the Court would have to conclude, based on the evidence, that they were not.

Plaintiff attempted to dissect the unitary appraised value by offering the testimony of Mr. Ralph Conte, a team leader and import specialist for the Customs Service at the New York Seaport since 1972, who advisorily made most of those appraisements involved in this case which were done at that seaport. His testimony did not show that the Seaport appraisements were reached by adding specific charges or amounts to ex-factory values. Moerover, Mr. Conte was unfamiliar with the appraisement method used by the import specialist at John F. Kennedy Airport with respect to the entries made at that location. His testimony established only that he accepted the F.O.B. values set out on the invoices and made no use of the disputed charges in reaching his appraisal.

The Court notes that plaintiff attempted to use certain documentary evidence regarding the *contemplated* appraisement by the import specialist of JFK (Plaintiff's Exhibits 8 and 9), but these do not establish how the appraisements were actually made. Moreover, in view of the fact that the parties stipulated that the appraisements at JFK were made in the same manner as those at the Seaport (Exhibit 4), it must follow that the deficiency of proof with respect to

the appraisements made at the Seaport controls all the appraisements.

The Court further notes that the mere fact that the appraised value happens to be the mathematical sum of the invoice price plus charges does not allow an inference that the elements of the appraisement are separable. *Mitsubishi International Corp.* v. *United States,* 78 Cust. Ct. 4, C.D. 4686 (1977) and *Haddad & Sons, Inv.* v. *United States,* 54 Cust. Ct. 600, R.D. 10942 (1965).

Since plaintiff did not succeed in isolating the element of buying commissions from within this unitary appraisement, it therefore had the burden of providing every element of its claimed export value within the purview of § 402(b), a burden which it did not satisf. On this question it must be stated that the testimony of plaintiff's only witness was simply not credible, was lacking in documentary support, was weakened or contradicted by evidence offered by the government (Defendant Exhibit I, page 1; Exhibit L, pp. 3–4 and Exhibit F). In short, plaintiff's attempt to prove that the merchandise in question was purchased at ex-factory prices through buying agents, was not supported by credible evidence.

Plaintiff's attempt to prove that the amounts it paid to certain parties designated as agents, was non-dutiable because they were fees for buying agents was entirely unpersuasive. Plaintiff's evidence consisted primarily of the testimony of Elliot Freedman, one of the owners of plaintiff, and copies of some buying agency agreements. The testimony at trial was riddled with gaps and inconsistencies and was directly contradicted by government investigative reports.

In reviewing the testimony, the Court finds that plaintiff failed to overcome the presumption of correctness attaching to the appraisement, *B & W Wholesale* v. *United States,* 58 CCPA 92, C.A.D. 1010, 436 F.2d 1399 (1971). Plaintiff failed to satisfy the standard of proof regarding the bona fidesse of an agency relationship between it and the alleged agents, *J.C. Penney Purchasing Corp., et al.* v. *United States,* 80 Cust. Ct. 49, C.D. 4741 (1978).

For the reasons given above, it is the judgment of the Court that the appraised value of the imported merchandise be affirmed and that this action be dismissed.

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